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June 28, 2007

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: July 20, 2006

Case Number: TSO-0415

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX. (hereinafter referred to as "the individual") to hold an access authorization <sup>1/</sup> under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." The individual's access authorization was suspended by a local DOE security office. As set forth below, it is my decision, based on the evidence and testimony presented in this proceeding, that the individual's access authorization should not be restored.

**I. Background**

The individual is employed at a Department of Energy (DOE) facility where his work requires him to have an access authorization. During a background investigation, the local DOE security office discovered some derogatory information that created a security concern. DOE asked the individual to participate in a Personnel Security Interview (PSI) in order to resolve the information. The PSI did not resolve the security concerns. Consequently, in April 2006, DOE suspended the individual's access authorization.

The local DOE security office issued a Notification Letter to the individual on April 21, 2006. The Notification Letter alleges under 10 C.F.R. § 710.8 (f) that the individual has "deliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire or a Questionnaire for Sensitive Positions, Personnel Qualifications Statement, a Personnel Security Interview, written or oral statements made in response to an official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization. . . ." 10 C.F.R. § 710.8 (f) (hereinafter referred to as Criterion F). In the Notification Letter, DOE also explained that the individual's illegal use of drugs while holding a DOE access authorization raised concerns under the security regulations codified at 10 C.F.R. § 710.8 (k) (hereinafter referred to as Criterion

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<sup>1/</sup> Access authorization is defined as an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material. 10 C.F.R. § 710.5(a).

K). <sup>2/</sup> Finally, the Notification Letter alleges that the individual has “engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable or trustworthy.” 10 C.F.R. § 710.8 (l) (hereinafter referred to as Criterion L).

Because of these security concerns, the case was referred for administrative review. The individual filed a request for a hearing on the concerns raised in the Notification Letter. DOE transmitted the individual’s hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as the Hearing Officer in this case.

At the hearing, the individual testified on his own behalf. The agency did not call any witnesses. The transcript taken at the hearing shall be hereinafter cited as “Tr.” Documents that were submitted by the DOE counsel during this proceeding constitute exhibits to the hearing transcript and shall be cited as “Ex.”

## **II. Standard of Review**

The Hearing Officer’s role in this proceeding is to evaluate the evidence presented by the agency and the individual, and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). 10 C.F.R. Part 710 generally provides that “[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest. Any doubt as to the individual’s access authorization eligibility shall be resolved in favor of national security.” 10 C.F.R. § 710.7(a). I have considered the following factors in rendering this decision: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct; the individual’s age and maturity at the time of the conduct; the voluntariness of the individual’s participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

When reliable information reasonably tends to establish the validity and significance of substantially derogatory information or facts about an individual, a question is created as to the individual’s eligibility for an access authorization. 10 C.F.R. § 710.9(a). The individual must then resolve that question by convincing the DOE that restoring his access authorization “would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). In the present case, the individual has not convinced me that restoring his security

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<sup>2/</sup> Criterion K concerns information that a person has “[t]rafficked in, sold, transferred, possessed, used or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law.” 10 C.F.R. § 710.8(k).

clearance would not endanger the common defense and would clearly be in the national interest. The specific findings that I make in support of this determination are discussed below.

### **III. Findings of Fact**

On May 13, 1998, the individual signed a DOE Security Acknowledgment certifying that he understood that any involvement with illegal drugs could result in the loss of his DOE security clearance. During an OPM background investigation and subsequent PSI in 1989, the individual admitted to using marijuana on one occasion in 1982. The individual stated that he had no intention of using illegal drugs in the future and on June 15, 1989, he signed a DOE Drug Certification certifying that he would not use or be involved with illegal drugs while in the possession of a DOE security clearance. Another OPM background investigation conducted in 2005 also identified issues regarding the individual's illegal drug use. This information prompted a PSI in January 2006 where the individual admitted to using marijuana from 1994 to approximately 2000.

On January 26, 1999, February 27, 2001, July 2, 2001, May 2, 2002, April 3, 2003, March 8, 2004, March 9, 2004 and February 7, 2005, the individual signed and dated Questionnaires for National Security Positions (QNSPs) certifying that in the last seven years he had not illegally used a controlled substance. However, during a personnel security interview (PSI) conducted on January 10, 2006, he admitted that he used marijuana from 1994 through 2000. <sup>3/</sup> The individual also signed and dated these QNSPs certifying that he never illegally used a controlled substance while in possession of a security clearance. However, during his January 10, 2006 PSI, the individual admitted that he used marijuana from 1994 through 2000, while in the possession of a security clearance. In addition, the individual signed these QNSPs (excluding that of January 26, 1999) certifying that in the last seven years he has not been fired from a job. However, during his January 10, 2006, PSI, he admitted that he was fired from his employment at a local plant because he failed a drug test.

### **IV. Analysis**

#### **A. Security Concerns Cited Under 10 C.F.R. § 710.8 (f), (k) and (l)**

False statements or misrepresentations by an individual in the course of an official inquiry regarding a determination of eligibility for DOE access authorization raise serious issues of honesty, reliability, and trustworthiness. The DOE security program is based on trust, and when an access authorization holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. *See, e.g., Personnel Security Hearing* (Case No. VSO-0013), 25 DOE ¶ 82,752 at 85,515 (1995) (*affirmed* by OSA, 1995); *Personnel Security Hearing* (Case No. VSO-0281), 27 DOE ¶ 82,821 at 85,915 (1999), *aff'd*, *Personnel Security Review* (Case No. VSA-0281), 27 DOE

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<sup>3/</sup> In his January 10, 2006 PSI, the individual also testified that he had not used marijuana or any other illegal drug since 1982. However, after being confronted with information in his record, he admitted that he used marijuana from 1994 to approximately 2000.

¶ 83,030 (2000) (terminated by OSA, 2000). This security concern applies, however, only to misstatements that are “deliberate” and involve “significant” information. 10 C.F.R. § 710.8(f) (Criterion F). Based on the record before me, I find that the individual deliberately misrepresented significant information on his QNSP. Consequently, DOE properly invoked Criterion F in this case.

A finding of derogatory information does not, however, end the evaluation of evidence concerning the individual’s eligibility for access authorization. *See Personnel Security Hearing* (Case No. VSO-0244), 27 DOE ¶ 82,797 (1999) (affirmed by OSA, 1999); *Personnel Security Hearing* (Case No. VSO-0154), 26 DOE ¶ 82,794 (1997), *aff’d*, *Personnel Security Review* (Case No. VSA-0154), 27 DOE ¶ 83,008 (1998) (affirmed by OSA, 1998). Cases involving verified falsifications or misrepresentations are nonetheless difficult to resolve because there are neither experts to opine about what constitutes rehabilitation from lying nor security programs to achieve rehabilitation. Therefore, Hearing Officers must look at the statements of an individual, the facts surrounding the misrepresentation or false statement and the individual’s subsequent history in order to assess whether the individual has rehabilitated himself from the falsehood and whether restoring the security clearance would pose a threat to national security. *See Personnel Security Hearing* (Case No. VSO-0327), 27 DOE ¶ 82,844 (2000), *aff’d*, *Personnel Security Review* (Case No. VSA-0327), 28 DOE ¶ 83,005 (2000) (*affirmed* by OSA, 2000); *Personnel Security Hearing* (Case No. VSO-0418), 28 DOE ¶ 82,795 (2001). In the end, as a Hearing Officer, I must exercise my common sense judgment whether the individual’s access authorization should be restored after considering the applicable factors prescribed in 10 C.F.R. § 710.7(c).

The Criterion K security concerns at issue here are predicated on statements made by the individual during a PSI conducted by the DOE in January 2006. Specifically, the individual told the Personnel Security Specialist that he used marijuana in 1982 on one occasion, and from 1994 to approximately 2000. As a general matter, use of an illegal drug by an individual holding a security clearance is a source of serious concern since the ability to safeguard national security information is diminished when judgment and reliability is impaired, and individuals who use illegal drugs may be susceptible to being coerced or exploited to reveal classified matters. In addition, the use of illegal drugs raises questions about an individual’s ability or willingness to comply with laws, rules and regulations. These concerns are indeed important and have been recognized by a number of Hearing Officers in similar cases. *See, e.g., Personnel Security Hearing* (Case No. VSO-0221), 27 DOE ¶ 82,792 at 85,762 (1999); *Personnel Security Hearing* (Case No. VSO-0200), 27 DOE ¶ 82,770 at 85,628 (1998). Lastly, the Criterion L security concerns at issue here chiefly stem from the individual’s violation of his DOE Drug Certification. The individual also signed a DOE Security Acknowledgment certifying that he understood that any involvement with illegal drugs could result in the loss of his security clearance. Both of these violations relate to the individual’s honesty, reliability and trustworthiness as well as his ability to safeguard national security information.

## **B. Mitigation of Criterion F**

The key issue under Criterion F is whether the individual has brought forward sufficient evidence to demonstrate that he can now be trusted to be consistently honest and truthful with the DOE. In considering this question, I found that the nature of the individual’s misrepresentations was serious.

The individual's lack of candor concerning an area in his life that could increase his vulnerability to coercion or blackmail raises important security concerns. The DOE must rely on individuals who are granted access authorization to be honest and truthful; this important principle underlies the criterion set forth in 10 C.F.R. § 710.8(f). This principle has been consistently recognized by DOE Hearing Officers. *See, e.g., Personnel Security Hearing* (Case No. VSO-0281), 27 DOE ¶ 82,821 at 85,915 (1999).

During the hearing, the individual was questioned about his falsifications on the various QNSPs he completed. He testified that he answered "No" to a question on an earlier QNSP regarding whether or not he had used drugs when he should have answered "Yes." The individual stated that he should have answered in the affirmative because he had tried marijuana in the past. Tr. at 28. He could not offer any other explanation for answering "No" on this QNSP. The individual testified that he should have corrected his answers on subsequent QNSPs, but explained that he simply copied the answers from one QNSP to the next to "speed up the process." *Id.* at 29. According to the individual, he "just made copies and I have had secretaries at work make a copy and turn it in, I guess, and re-date it." *Id.* The individual further testified that he did not smoke marijuana from 1988 to 1993 and asserted that the last time he smoked marijuana was sometime in 1999 or 2000, although he could not recall the circumstances surrounding his use. *Id.* at 33, 36. Again, the individual admitted to providing inaccurate information regarding his drug use on the various QNSPs he completed over the years, most recently a February 2005 QNSP. He testified that he thought he might lose his clearance if he disclosed his drug use and again stated that he really did not take the time to read his QNSPs. Tr. at 42.

The individual further testified that he is an honest person and that his family and co-workers know about his drug use. *Id.* at 47. Nevertheless, the individual still could not offer an explanation for why he did not answer his QNSPs truthfully, "I just don't understand why I didn't do it, but I just didn't and I wish I would have because now I'm thinking . . . everybody knows about it. . . . Just going through real quick, just trying to put it out of my mind completely and forget about it and go on like it never happened." *Id.* at 56. The individual further testified that he could not be blackmailed or coerced with the information regarding his drug use. *Id.* at 58. Finally, when questioned about his future intentions regarding completing QNSPs, the individual testified that he will read the QNSPs and answer the questions honestly. *Id.* at 59.

The individual also testified about his falsification regarding his being fired from a job because he failed a drug test. According to the individual, his job steward told him he had a "non-negative" drug sample and gave him the option of disputing the result and retesting. Tr. at 15. The individual stated that he had only been working on this job for four days and he decided to "drag up [quit] and leave." He testified to the following, "in the business I'm in and union, if you drag a job up, you just drag up and you go to another job. Or you are laid off or reduction in force, or whatever reason, you just go to another union hall and get a referral and go to work somewhere else. I didn't know what they would have done, but I didn't give them a chance or I didn't give myself a chance to go any further with it. I just left." *Id.* at 16. The individual testified that he did not know whether the drug test was accurate or not, but admits that he probably smoked marijuana prior to his employment at this job. *Id.* The individual testified that he did not feel any of the questions regarding firing on the

QNSP, (i.e., has any of the following happened to you in the past seven years: fired from a job, quit a job after being told you are fired or left the job by mutual agreement following allegations of misconduct) applied to him. However, he did not explain why he admitted in his January 2006 PSI that he was fired from this employment because of a failed drug test.

In a number of decisions, DOE Hearing Officers have considered the implications of falsifications. The factors considered in these cases include the following: whether the individual came forward voluntarily to admit his falsifications, *compare Personnel Security Hearing* (Case No. VSO-0037), 25 DOE ¶ 82,778 (1995), *affirmed* (OSA, 1996) (voluntary disclosure by the individual), *with Personnel Security Hearing* (Case No. VSO-0327), 28 DOE ¶ 83,005 (2000), *affirmed* (OSA, 2000) (falsification discovered by DOE security); the length of time the falsehood was maintained; whether a pattern of falsification is evident; and the amount of time that has transpired since the individual's admission. *See Personnel Security Hearing* (Case No. VSO-0327) (2000), *affirmed* (OSA, 2000) (less than a year of truthfulness insufficient to overcome long history of falsification). *See also Personnel Security Hearing* (Case No. VSO-0289), 27 DOE ¶ 82,823 (1999) (19 months since last falsification not sufficient evidence of reformation from falsifying by denying drug use); *Personnel Security Hearing* (Case No. VSO-0319), 27 DOE ¶ 82,851 (2000), *affirmed* (OSA, 2000).

After considering all the evidence before me, I find the individual has failed to mitigate the security concerns arising from his omissions about his marijuana use and his previous employment situation. Although the individual testified that he now understands the importance of being completely honest in his responses, I find his explanation for his omissions to be unpersuasive. First, the individual's willingness to conceal information from the DOE in order to avoid adverse consequences is an action that is simply unacceptable among access authorization holders. *See Personnel Security Hearing* (Case No. VSO-0013), 25 DOE ¶ 82,752 (1995), *affirmed* (OSA, 1995). In addition, the individual did not come forward to report his omissions on his own volition. The individual admitted to his marijuana use and the fact that he was fired from a job because of a failed drug test during the course of a January 2006 PSI. If the individual had not been interviewed at that time, there is no indication in the record that the individual would have come forward voluntarily to correct his falsifications. Second, the individual maintained his falsification from at least 1999 through 2005. Third, the individual's falsifications are recent. Fourth, the individual acknowledged during the hearing that he intentionally did not disclose his drug use because he knew might lose his security clearance. Fifth, during the period that the individual maintained the falsehood, the individual was vulnerable to blackmail, pressure or coercion. Sixth, at the time of his falsifications, the individual was an mature adult. For all the foregoing reasons, I find that the individual has failed to mitigate the security concerns raised by Criterion F.

### **C. Mitigation of Criterion K**

During the hearing, the individual testified that he had not used marijuana since 1999 or 2000. Although he is an active member of his church and has submitted numerous character reference letters from members of his family, church and community, I am not convinced that the individual has not used illegal drugs since 2000. Based on the testimony during the hearing, it is unclear whether the individual's character references knew about his drug use and other information he

falsified on his QNSPs. These persons were not available at the hearing and therefore there was no opportunity to question them concerning the individual's current situation. Most importantly, I did not find that the individual provided credible assurances that he will not use drugs in the future. In the end, the individual has not provided compelling testimonial evidence that leads me to conclude that his past use of illegal drugs is unlikely to recur. Accordingly, after carefully weighing all the evidence, both favorable and unfavorable, I find that the individual has not provided sufficient compelling evidence to mitigate the Criterion K concerns at issue.

#### **D. Mitigation of Criterion L Concerns**

To support its Criterion L allegations, the DOE alleges in the Notification Letter that: (1) on May 13, 1998, the individual signed a DOE Security Acknowledgment certifying that he understood that any involvement with illegal drugs could result in the loss of his DOE security clearance, and (2) on June 15, 1989, the individual signed a DOE Drug Certification certifying that he would not use or be involved with illegal drugs while in the possession of a DOE security clearance. Despite the acknowledgment and the certification, the individual used marijuana from 1994 to 2000, while in the possession of a DOE security clearance. These Criterion L concerns raise serious questions about the individual's honesty, reliability and trustworthiness. During the course of the hearing, the individual could not offer any reasonable explanation as to why he violated his DOE Security Acknowledgment and DOE Drug Certification. In addition, based on his testimony, I do not believe the individual fully comprehends the importance the DOE places on his honesty and his ability to keep his promises with the DOE. I find, therefore, that the individual has not mitigated the Criterion L security concerns.

#### **IV. Conclusion**

As explained in this Decision, I find that the DOE properly invoked 10 C.F.R. § 710.8(f), (k) and (l). I find that the individual has not presented adequate mitigating factors that alleviate the legitimate security concerns under Criteria F, K and L. In view of the record before me, I find that the individual has not demonstrated that restoring his access authorization would not endanger the common defense and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should not be restored. The individual may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Kimberly Jenkins-Chapman  
Hearing Officer  
Office of Hearings and Appeals

Date: June 28, 2007